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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CUTBERTO DE LEON-MARISCAL,

Defendant - Appellant.

No. 05-10015

D.C. No. CR-04-00004-HDM

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Submitted November 13, 2007^{**}

Before: TROTT, W. FLETCHER, and CALLAHAN, , Circuit Judges.

Cutberto De Leon-Mariscal appeals from the 57-month sentence imposed following his guilty-plea conviction for unlawful reentry by a deported alien, in violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C.

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1291, and we vacate and remand.

De Leon-Mariscal contends that his sentence violated the Sixth Amendment because it was imposed under the mandatory Sentencing Guidelines, prior to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). We vacate and remand because De Leon-Mariscal preserved his claim that he is entitled to resentencing under the advisory Guidelines, and the government cannot show that the error is harmless. *See United States v. Beng-Salazar*, 452 F.3d 1088, 1091-92, 1097 (9th Cir. 2006). Because we remand for resentencing, we need not reach De Leon-Mariscal's remaining contention that the district court erred by finding a fact beyond the fact of his prior conviction when it determined that he was removed subsequent to the conviction. *See United States v. Bolanos-Hernandez*, 492 F.3d 1140, 1148 (9th Cir. 2007).

VACATED and REMANDED.